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August 7, 2001

VIA MESSENGER

Chairman of the Federal Election Commission
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MURs 4568, 4633, 4634 and 4736

Dear Mr. Chairman:

This is in response to the letter from the Acting General Counsel, Lois Lerner dated July 18, 2001, stating that the General Counsel's Office was prepared to recommend that the Commission find probable cause to believe that Robert Cone violated 2 U.S.C. §§ 441a(a)(1) and 441a(a)(3) of the Federal Election Campaign Act of 1997, as amended ("Act"). Accompanying Ms. Lerner's letter was the General Counsel's Brief setting forth the General Counsel's analysis and the facts selected from their investigatory records supporting their recommendation. Since the receipt of the Brief, Respondents' counsel has been in contact with the General Counsel's Office through the mail, faxed letters and telephone conversations, regarding the access counsel would have to the factual materials gathered by the Commission in this matter. The General Counsel's Office obviously conducted numerous depositions and interviews, many of which are referred to in the Brief. As of this date, I have not had a clear answer as to the access I may have to these materials. Since I have not had a response in full to my requests for access, it should be obvious that I have not had the opportunity to review these materials before responding to the Brief.

The Acting General Counsel's letter states that after considering all the evidence available to the Commission, the Office of General Counsel is prepared to recommend that the Commission find probable cause. Unfortunately, counsel for Mr. Cone did not have the opportunity to consider this evidence prior to responding with this document to the General Counsel's arguments.

Robert L. Cone Background

Prior to 1995 Mr. Cone had little interest in active participation in the political process, except for voting. Mr. Cone's primary activities were small business operations and charitable

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giving. During 1995, it came to his attention that the then proposed Clinton healthcare bill would require that his companies pay insurance premiums for abortion services. This would have been a moral and ethical dilemma since it is his personal conviction that abortion is the killing of a child. In early 1995 Mr. Cone was introduced to Carolyn Malenick. Through Carolyn Malenick (CSM), Mr. Cone became aware of Eagle Forum and their effort to stop the Clinton healthcare proposal. After considerable planning, Mr. Cone ran an issue-advertising program in conjunction with and through Eagle Forum in the summer of 1995. After the defeat of the healthcare proposal, Mr. Cone began to learn more about the political process.

During this time, Mr. Cone realized that some of the same problems exist with political giving as he had found with charitable giving. For years, he had hoped that someday he would have time to begin developing educational effort for possible donors to charitable causes that he held dear. Now he saw the need to do the same thing for the political process.

Having worked closely with CSM during 1995, Mr. Cone became aware of her background and interests. CSM indicated that she was frustrated with the way major donors were approached for giving and that they were in many cases taken advantage of by donor organizations that handled their money poorly. CSM was interested in developing a business that would represent major donors and provide them with research prior to their giving activity. The business would focus on advice to possible donors, not fundraising for any particular candidate or committee.

Mr. Cone realized that with CSM's experience, knowledge and work ethic, she could accomplish his desire to develop education or advice program for major donors for charitable and political purposes. Mr. Cone, therefore, agreed to fund the beginning stages of this effort. Although General Counsel for the FEC has portrayed this finding as illegal political donations, it was payment for services rendered, since this is a project that Mr. Cone wanted carried out. To Mr. Cone's knowledge, no one else was providing this service to individual donors and, therefore, was a new business idea and venture. Any examination of the initial organizational and promotional documents show that Triad was designed as a fee-for-services business. All of the promotional documents discuss the for-profit nature of the business, services for donor clients and candidates.

Business Purpose of Triad/CSM and Triad, Inc.

Throughout the Brief, there are questions regarding the business purpose of Triad and Triad, Inc. (T & TI). This is based on a relatively short history looking back on the 1996 outcome and translating that into the intention.

Thousands of businesses are started every year with the intention of supplying a product and/or service and making a profit doing so. As the statistics show, most of these startups either do not make it or radically change their product or service to more nearly conform to customers' needs. Most businesses go through paradigm shifts multiple times before coming up with the right business plan. Also, each business must start with their first product or service and later, as

success comes, add additional products or services. This was the case with T & TI. T & TI started with the service to political donors because of the timing of the coming political activity and the current experience of the founder (CSM). Additional services were to be added later as time and effort allowed, including charitable giving services.

New products and services must meet the customers' needs and must be marketed properly to get the attention of the potential customer. When a new concept is introduced, it is even more difficult to get the customer's attention. Marketing the T & TI service required "free" exposure to the service to determine if the service would eventually be able to be charged for and at a profitable price.

Funding of new businesses comes from many directions: friends, relatives, associates investors and others. Most new businesses are not profitable and do not have positive cash flow in the very beginning. T & TI was funded by Mr. Cone on an "as you go" basis as cash was needed. This could be translated as "time and material" just as well. Since Mr. Cone was kept abreast of the progress being made, he was comfortable that the money for the "Donor Development Project" was being spent properly. Much as been made of the fact that most of the funds to run T & TI came from one source, namely Mr. Cone. Again, there are hundreds, if not thousands, of businesses dependent on one customer for their entire business life and multiple thousands more who are dependent on one customer for their startup years. Mr. Cone is involved in a software business that has consumed multiple millions of dollars and has been operating for six years without any outside revenue yet and he still fully expects to have a viable and profitable company.

The Brief questions the terminology being used for incoming funds: donations and gifts vs. fees. Consideration should be given to the fact that the founder of T & TI (CSM) had come from the fundraising field with its set of terminology and now was moving into the for-profit field with its own set of terminology. The General Counsel made mention of Mr. Cone's internal computer category notation GI [Gift] as evidence that the distributions were not fees for service. This designation simply allocates the funds as non-investment and non-tax deductible.

In summary, T & TI were conceived and developed as for-profit businesses with all of the attendant startup glitches, shortfalls, mistakes and omissions that plague most startups. But, it was originally conceived and was operating with the intention of becoming a profitable business servicing the needs of major charitable and political donors. Unfortunately, with the Senate Finance Committee hearing, the Department of Justice investigation, the Federal Election Commission investigation and the adverse media attention it was impossible for T & TI to continue with the growth of the business as originally intended. So the final possible outcome economic viability of this idea will never be known and the results now have to be interpreted in the light of a truncated business life cycle.

Business Process of Triad/CSM and Triad, Inc.

In order to provide a quality service to the prospective customers of T & TI, the one main ingredient that was needed was valid research. For the first service, political counsel, to be offered, political research had to be done. Therefore, political consultant, Carlos Rodriguez, was hired to do political audits. As the Brief states, over two hundred and fifty interviews were done with 50-60 being in-person interviews. This extensive research was done in order to produce a product/service that would have credibility with major donors. Certainly, if this were not intended to be a business and only a vehicle to transmit illegal political dollars, the cost of this research would have been totally unnecessary. Without this research, the audits, it is difficult to understand what unique service T & TI could market.

Instances are provided in the Brief of candidates receiving benefit from counsel with Mr. Rodriguez during his audits of the campaign. Candidates talk to hundreds of people during a campaign, many of whom provide the candidate with "counsel". Some suggestions are taken and used and others are discarded, but each of these is not considered an in-kind contribution. Extensive interviews for audit research necessarily involves much conversation, but any advice given to the candidates by Mr. Rodriguez was minimal, incidental and of no "billing" value. The only purpose for the audits was to collect information for T & TI in conjunction with their service to their prospective clients. This reflects Mr. Rodriguez's understanding of his role as clearly expressed in his deposition. The Brief fails to provide the Commissioners with any candidate plans, letters and scripts prepared by Mr. Rodriguez because none exists. T & TI neither solicited nor accepted funds from candidates, campaigns, PACs or committees so that their service to clients would not be influenced or compromised by a conflict of interest.

Triad/CSM and Triad, Inc. Relationship with PAC(s)

T & TI did extensive interviews with various political committees to determine their philosophies and overhead costs. This, again, was in order to determine if their goals met with the goals of T & TI's prospective clients. Determination of overhead costs would give knowledge of the efficiency of the use of donated funds.

There are numerous incidents of funds being donated by individuals to political committees, and the same or similar amounts being donated to specific candidates within days of their receiving those donations. PAC managers responsible for collecting and distributing funds do not work in a vacuum. They know where the funds come from and in most cases, know their preferred candidates. This does not mean that they have been coerced or that earmarking has been requested. The PAC manager makes the final decision and the Brief fails to provide the Commissioners with document or testimony from any candidate or committee, stating that any contribution was earmarked to any specific candidate.

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Citizens for Reform and Citizens for the Republic education Fund

Mr. Cone donated money to Citizens for Reform ("CR") and Citizens for the Republic Education Fund ("CREF") whose 1996 activities included the creation of advertisements or public communications that included reference to identifiable candidate for federal office. Mr. Cone's donations to these organizations was predicated on his understanding that neither organization would make a contribution or expenditure advocating the election or defeat of any candidate for federal office. All fundraising for these organizations was predicated on express verbal and written representations to donors that these organizations were not political committees and that they would undertake no activities which would incur any obligations to file any disclosure reports with the Commission. Mr. Cone understood that their public communication activities would be modeled after the communication or issue campaigns of the AFL-CIO. There is nothing in the public record relating to the issue activities of the AFL-CIO or the Business Coalition that reflect any legal distinction between their issue activities in 1996 and CR or CREF. In fact, the public record indicates significantly less contact or communications between CR and CREF regarding their activities than between the AFL-CIO or the Business Coalition and party and candidate representatives. The issue activities of the AFL-CIO and Business Coalition were known to the party committees and their candidates. This was not the case regarding any of CR and CREF activities.

The General Counsel recognizes, these two organizations, CR and CREF, did not conduct any public communications expressly advocating the election or defeat of any candidate for federal office. This fact is undisputed by the General Counsel's Office. Since these organizations made no expenditures expressly advocating the election or defeat of any federal candidate, and made no contribution to such candidate, the organizations are not political committees as defined by the Act.

The new regulations promulgated by the Commission, in the words of the Commission, define coordinate general public communication according to the standard set forth by the District Court in FEC v. The Christian Coalition, 52 Fed. Sup. 545, 85(D.D.C.99)¹. The Brief fails to reference these regulations because the activities of CR and CREF do not meet the requirements to be coordinated communications under the Commission's present regulations.

No public communications by CR or CREF were made at the request or suggestion of any candidate, any candidate authorized committee, a party committee or their agents. The Commissioners will search in vain to find a single reference in the General Counsel's facts and analysis to any candidate or their agent making a request or suggesting that CR or CREF do anything.

No candidate, candidate authorized committee or party committee, exercised any control or decision-making authority over the content, timing, location, mode, intended audience,

¹ FEC memorandum to Regulated Community, May 2001, Page 1.

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volume of distribution or frequency of place of any communication of CR or CREF. The Brief does not even allege such activities, much less provide the Commissioners with any factual support for such an allegation. In fact, it is clear that the General Counsel's Office found no evidence that any candidates were aware of any plans of these organizations to create, produce or distribute any communication.

CR and CREF neither created nor produced communications after substantial discussions or negotiations between them and any candidate committee, party committee or their agents. The Commissioners are provided with no proof of such substantial discussions. There were no substantial discussions that resulted in collaboration or agreement about the contents, timing, location, mode, intended audience or volume of distribution or frequency of placement of any CR's or CREF's communications. It is clear that there were no candidates, agents of candidates, or party committees that were aware of any plan for any communications.

The media vendors for CR and CREF were provided with specific direction not to communicate with any candidate, candidate's agents, or party organizations regarding these communications. The General Counsel's Office fails to mention this fact anywhere in its Brief. CR and CREF media vendors were forbidden to perform any work for any candidate mentioned in their communications. The General Counsel fails to mention this fact anywhere in its Brief.

The General Counsel's Office makes very limited direct reference to its interviews with candidates or their agents regarding CR and CREF. The obvious reason for this omission is that the General Counsel's interviews or depositions of candidates, candidate's agents, and party committees resulted in no evidence of any substantive negotiations or discussions regarding these advertisements.

The Brief meticulously avoids the depositions of Carlos Rodriguez when he unequivocally denies that there was any communication regarding issue advertising with candidate campaigns. Mr. Rodriguez explicitly states in his deposition the reason why such communication did not take place between any representative of these organizations and any candidate campaign. The General Counsel's Office studiously avoids Mr. Cone's deposition in which he states his understanding that such communication were prohibited at the express direction of Ms. Malenick. In the Brief, the General Counsel's Office carefully avoids any extensive quotations from the various vendors of the advertisements, quotations which respondents can only speculated must also include such specific denials of any coordination or contact with any candidate's campaigns.

The Brief quoted the *Christian Coalition's* decision as stating: "the fact that the candidate has requested or suggested or engaged in certain speech indicated that this speech is valuable to candidate, giving [expressive] expenditures sufficient contributions and qualities to fall within the Act..." (Christian Coalition of 1992). Assuming for purpose of this argument that this statement drawn from the Christian Coalition decision is the basis on which the Commission should analyses these activities, rather than the Commission's present regulations, the Brief fails to show that these activities occurred. After more than four years of interviews by numerous

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newspaper reporters, Senate investigators, FBI agents and Commission attorneys, if there was evidence of coordination between CR and CREF and candidates or their agents, surely the General Counsel's Office would have presented that evidence to the Commissioners. The General Counsel has provided the Commissioners with not a single example of a candidate or candidate's representative requesting that CR or CREF engaged in any specific speech or to conduct any advertising campaign. The General Counsel's Office has not been able to find a single candidate or a single candidate's representative to acknowledge that they made such a request of CR or CREF nor a single document regarding any such request. The General Counsel's Office has failed to provide the Commissioners with a single example of a candidate or a candidate's representative suggesting that CR or CREF engaged in any specific communication, or with the exception of a single footnote, any indication that any candidate or their agents even knew such organization existed. Frankly, there are no issues discussed in any public communication by CR or CREF which could not be found in general media accounts discussing these individuals.

Conclusion

The Commissioners should reject the General Counsel's recommendation regarding Robert Cone and should close this matter without further action.

Sincerely,



Mark Braden

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